

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
VARIANCE PERMIT GRANTED BY  
PIERCE COUNTY TO RAYMOND AND  
GRETCHEN MILLIE AND DENIED BY  
DEPARTMENT OF ECOLOGY,

RAYMOND and GRETCHEN MILLIE  
and PIERCE COUNTY,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

SHB No. 86-9

FINAL FINDING OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

THIS MATTER, the request for review of the disapproval by the Washington State Department of Ecology of a shoreline variance permit granted by Pierce County to Raymond and Gretchen Millie, came on for hearing before the Shorelines Hearings Board; Lawrence J. Faulk, Chairman, Gayle Rothrock, Wick Dufford, Nancy R. Burnett, Rodney M. Kerslake, and Les Eldridge, Members convened at Lacey, Washington on June 25, 1986. Administrative Appeals Judge William A. Harrison presided.

1 Appellants Mr. and Mrs. Millie appeared by Michael J. Turner,  
2 their attorney. Appellant Pierce County appeared by Robin Jenkinson,  
3 Deputy Prosecuting Attorney. Respondent Washington State Department  
4 of Ecology appeared by Allen T. Miller, Jr., Assistant Attorney  
5 General. Reporter Cheri L. Davidson recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. From  
7 testimony heard and exhibits examined, the Shorelines Hearings Board  
8 makes these

9 FINDINGS OF FACT

10 I

11 This matter arises on the White River in Pierce County just  
12 upstream of the juncture where the Greenwater River flows into the  
13 White.

14 II

15 The White River is an active watercourse of high velocity capable  
16 of carrying heavy loads of debris. Its course can change rapidly and  
17 dramatically.

18 III

19 The generally accepted means of assessing the flood danger posed  
20 by a river is to determine its geographical limits during a 100-year  
21 flood. A 100-year flood is one which would occur, on the average,  
22 once each 100 years. This assessment approach is adopted by the  
23 statewide flood control regulations of the respondent, Department of  
24 Ecology. WAC 508-60-030.

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IV

A 100-year flood has not yet been recorded on the White River. However, a lesser, 50-year flood would entail a flow of 18,700 cubic feet per second of water. The following floods have been recorded on the White, each being less than even a 50-year flood:

1. 18,100 cubic feet per second . . . . 1933
2. 11,100 cubic feet per second . . . . 1956
3. 14,300 cubic feet per second . . . . 1960
4. 10,400 cubic feet per second . . . . 1965
5. 13,900 cubic feet per second . . . . 1975
6. 17,800 cubic feet per second . . . . 1977

V

In 1972, the United States Army Corps of Engineers established and mapped the 100-year flood parameters of the White River in the area in question. During or just previous to 1972, under circumstances blurred by time, a plat known as "Greenwater Village" was established for homesites within the 100-year floodway of the White River. The plat was specifically denied approval by the respondent, Department of Ecology (DOE) under the flood control program codified at chapters 86.16 RCW and 508-60 WAC.

VI

Notwithstanding this, appellants Mr. and Mrs. Millie bought or built a recreational cabin in 1975 on lot 16 of the Greenwater Village Plat and within the 100-year floodway of the White River. There is no evidence that any flood control zone permit was first acquired from

1 the DOE allowing this cabin to be built.

2 VII

3 The 1977 flood of the White River referred to in Finding of Fact  
4 IV, above, divided the White River's channel in front of the Millie  
5 cabin. A large portion of their lot is now underwater. The  
6 floodwaters of this less-than-50-year flood rose up on the foundation  
7 of the Millie cabin. The post-1977 topography of the White River is  
8 such that any further shift of the channel would be towards the Millie  
9 cabin. The 1977 flood caused destruction of a motel and other  
10 buildings on the Greenwater River close to the site in question.

11 VIII

12 In 1980, Pierce County installed certain public works structures,  
13 a groin and other devices, on the White River upstream of the Millie  
14 cabin. However, these are largely devised to prevent normal, erosion  
15 of the riverbank. They provide little or no flood protection.

16 IX

17 In 1985, following his retirement, Mr. Millie applied to Pierce  
18 County for a building permit to make an addition to his cabin which  
19 would double its size and render it suitable for use as a principal  
20 residence. Pierce County granted a building permit. Mr. Millie  
21 placed his footings 15 feet back from the ordinary high water mark of  
22 the White River. Taking note of this, a county inspector cited to Mr.  
23 Millie the 50 foot setback provided in the Pierce County Shoreline  
24 Master Program (PCSMP), chapter 65.62.050. The county then suggested  
25 that Mr. Millie apply for a variance from this shoreline (PCSMP)

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1 setback. Mr. Millie did so, indicating that his proposed development  
2 would be set back 15 feet.

3 X

4 Both the original cabin of Mr. and Mrs. Millie and the proposed  
5 addition would be in direct danger of destruction by floods which the  
6 White River is capable of producing at 100 year or less frequency.  
7 Moreover, the cabin or addition is directly susceptible to being  
8 dislodged by flood and thereby causing further damage through collision  
9 or channel blockage which expands the flooding. There is inherent in  
10 this a significant danger to lives and property.

11 XI

12 The PSCMP contains the following policy on residential development:

13 Residential Development: . . .

14 (b) The residential use of areas intrinsically unsuited  
15 for urban uses can have severe negative impact on  
16 the environment along with creating conditions  
17 prone to natural disaster. Therefore, the County  
18 should prohibit the residential use of such  
19 unsuitable areas. (P. 28)

20 Shoreline Protection: . . .

21 (e) All effort should be made to minimize the need for  
22 structural flood controls through a variety of  
23 programs, including limitation of building in  
24 historically flood prone areas, regulations on  
25 design of structures and limitation of increased  
26 peak flows from new developments on uplands.  
27 (P. 35)

28 XII

29 The PCSMP contains the following criteria for varying its  
30 requirements:

31 65.72.020 VARIANCES. It is understood that  
32 the regulations may cause unnecessary hardships in

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1 particular situations, or that the regulations  
2 might be unreasonable in light of new evidence,  
3 technology, or other special circumstances, and the  
4 goals and policies of the Master Program may not  
5 necessarily be served by the strict application of  
6 the regulations. The property owner must show  
7 that if he complies with the provisions he cannot  
8 make any reasonable use of his property. The fact  
9 that he might make a greater profit by using his  
10 property in a manner contrary to the intent of the  
11 program is not a sufficient reason for a Variance.

12 A Variance will be granted only after the  
13 applicant can demonstrate the following:

- 14 A. There are conditions or circumstances involved with  
15 the particular project that make strict application  
16 of the regulations unnecessary or unreasonable for  
17 the applicants proposal.
- 18 B. That granting the Variance will not violate,  
19 abrogate, or ignore the goals, policies, or  
20 individual environment purposes spelled out in the  
21 Master Program.
- 22 C. That no other applicable regulations will be  
23 violated, abrogated, or ignored.
- 24 D. That the public health, safety and welfare will not  
25 be adversely affected.
- 26 E. That the specific provision or provisions to be  
27 relaxed clearly did not foresee or consider the  
28 particular situation the applicant is facing.

### 29 XIII

30 Upon hearing and reconsideration, Pierce County approved the  
31 shoreline variance subject to the condition that Mr. Millie obtain a  
32 flood control zone permit from DOE.

### 33 XIV

34 Exercising its obligation under RCW 90.58.140(12) to either  
35 approve or disapprove all shoreline variances, DOE considered the

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1 variance granted by Pierce County to Mr. Millie and disapproved it by  
2 letter dated February 14, 1986. On March 13, 1986, Mr. Millie  
3 requested review by this Board of that disapproval.

XV

4 On April 23, 1986, Mr. Millie applied to DOE for a flood control  
5 zone permit under chapter 86.16 RCW. The same was denied by DOE in a  
6 decision dated May 20, 1986. The primary reason cited for denial was  
7 that the proposal conflicts with WAC 508-60-040 which prohibits  
8 structures designed for human habitation of a permanent nature within  
9 the 100-year floodway. This decision was not appealed.

XVI

1 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
2 adopted as such.

3 From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

4 This matter is the review of a variance decision under the  
5 Shoreline Management Act, chapter 90.58 RCW, and the implementing  
6 Pierce County Shoreline Master Program (PCSMP). The criteria for such  
7 a variance is that found in the PCSMP itself.<sup>1</sup>

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8 1/ Although a further variance criteria has been adopted by DOE at  
9 WAC 173-14-150, a DOE rule provides that a more restrictive criteria  
10 in the master program (e.g. PCSMP) will apply. WAC 173-14-155. The  
11 PCSMP provision here is more restrictive. See also Strand v.  
12 Snohomish County and DOE, SHB No. 85-4 (1985) and Simchuck and Pierce  
13 Co. v. DOE, SHB 84-64 (1985).

1 II

2 Applying the PCSMP variance criteria (text at Finding of Fact XII,  
3 above) our attention is drawn immediately to the provision that no  
4 other applicable regulations will be violated, abrogated or ignored.  
5 The variance being sought would allow a structure designed for human  
6 habitation of a permanent nature within the 100-year floodway. This  
7 violates, abrogates and ignores the Flood Control Zones by State Act,  
8 chapter 86.16 RCW as implemented by WAC 508-60-040. Such structures  
9 are prohibited outright by that authority and the appellate cases  
10 support this policy. Maple Leaf Investors v. Department of Ecology,  
11 88 Wn.2d 726, 565 P.2d 1162 (1977) and Anderson v. Department of  
12 Ecology, 34 Wn.App. 744, 664 P.2d 1278 (1983). The proposal is  
13 inconsistent with "C." of the variance criteria.

14 III

15 There are no conditions involved with this particular project that  
16 make strict application of the regulations unnecessary or unreasonable  
17 for the applicant's proposal. The proposal is inconsistent with "A."  
18 of the variance criteria.

19 IV

20 The granting of this variance would violate, abrogate and ignore  
21 the PCSMP Policy (text at Finding of Fact XI) against residences in  
22 intrinsically unsuited areas and against building in historically  
23 flood prone areas. The proposal is inconsistent with "B." of the  
24 variance criteria.

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V

The granting of this variance would substantially threaten and therefore adversely affect the public health, safety and welfare. The proposal is inconsistent with "D." of the variance criteria.

VI

The specific provision to be relaxed, a 50 foot setback from ordinary high water, does foresee and consider the particular situation the applicant is facing. The proposal is inconsistent with "E." of the variance criteria.

VII

The Department of Ecology's disapproval of this variance is correct and should be affirmed.

VIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

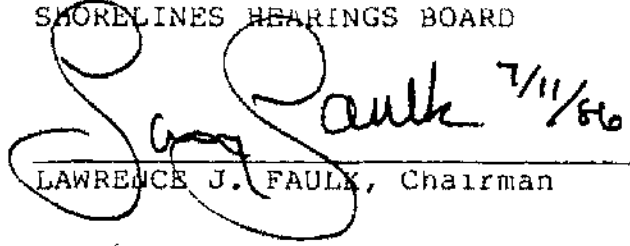
From these Conclusions of Law the Board enters this


ORDER

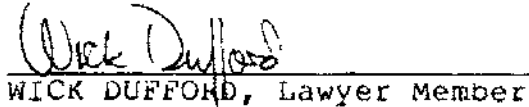
The disapproval by Department of Ecology of the shoreline variance conditionally granted by Pierce County to Mr. and Mrs. Raymond Millie is hereby affirmed.

DONE at Lacey, Washington, this 11th day of July, 1986.

SHORELINES HEARINGS BOARD

  
LAWRENCE J. FAULK, Chairman

  
GAYLE ROTHROCK, Vice-Chairman

  
WICK DUFFORD, Lawyer Member

  
NANCY R. BURNETT, Member

  
RODNEY KERSLAKE, Member

  
LES ELDRIDGE, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge

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